IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1967**

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**No. 456**

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NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

*v.*

BATA SHOE COMPANY, INC., and UNITED SHOE WORKERS OF AMERICA, AFL-CIO

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## UNION'S MEMORANDUM JOINING IN THE NATIONAL LABOR RELATIONS BOARD'S PETITION FOR CERTIORARI.

i. *Statement.* Bata Shoe Company, one of the largest shoe manufacturing concerns in the United States, is conspicuous among the remaining non-union shoe producers in the nation. The Company's adamant opposition to unionization reaches back to the earliest years under the Wagner Act. It is highlighted more recently by the fact that in the last decade six massive election campaigns were required at Bata before the Union was able in 1965 to overcome the bitterly hostile Company propaganda and achieve formal approval by a majority of the workers.

The first United Shoe Workers petition for representation of Bata Company employees went to a Labor Board election on June 24, 1955, and resulted in a vote of 421 for the Union and 634 against. The Union promptly filed ob-

jections to the Company's illegal interference with the workers' free choice in the election. The Union's objections were upheld by the Labor Board (*Bata Shoe Company, Inc.*, 116 NLRB 1239), causing a re-run of the election on October 2, 1956, wherein the vote once more went against the Union. Another representation election at the instance of the Union was held on April 25, 1958, resulting in a third defeat for the Union. A fourth Board election was held on March 17, 1961, wherein the United Rubber Workers also sought recognition and the balloting failed to produce a majority vote for either union. A fifth election was held on December 19, 1963, resulting in 1,043 votes for the United Shoe Workers, 1,030 against, with 18 challenged ballots. When the Board ruled in 1964 that the 18 challenged employees were eligible to vote, their ballots were counted and the Union lost the election by a five-vote margin.

The sixth Bata election—the one at bar—was held on April 23, 1965. A majority vote having been cast for the United Shoe Workers of America, AFL-CIO, the Board on August 25, 1965 certified the Union as the collective bargaining representative of the workers. The Company, however, after first stating that it was ready to sit down with the Union to bargain a contract,[1] then turned around and declined to bargain with the Union and thus prompted the filing of the unfair labor practice charge under Section 8(a)(5) of the Act which resulted in this litigation.

On October 1, 1965 the Board's General Counsel issued a Complaint against the Company for its refusal to bargain. The Company's Answer admitted its failure to bargain; but

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[1] "The Bata Shoe Company will sit down at the bargaining table with the United Shoeworkers of America to draw up a contract 'some time in the next week or so,' a company spokesman said yesterday.

Frank Novak, personnel director of the Belcamp plant, said that company lawyers would handle negotiations with the union . . ." THE AEGIS (Bel Air, Md.), Sept. 9, 1965, p. 1.

in defense thereof it challenged the Union's certification by the Board, alleging that the Board had erred in finding the election in April of 1965 a valid expression of the desire of the majority of Bata workers to be represented by the United Shoe Workers. When the case came on for a formal adjudicatory hearing before a Trial Examiner of the Board on November 4, 1965, the Company had its opportunity to prove its objections; but after the Company outlined the evidence it was going to produce to prove its pleaded objections to the election and Board certification, it then suddenly and without explanation, declined to go forward with its proffered evidence (see Pet., pp. 26-27). In its case to the Trial Examiner the Company offered but a single witness—its own counsel—on a minor question as to what had been contained in the formal record before the Labor Board in the prior certification proceeding. Thereafter, the Company rested without introducing any evidence in support of its objections to the Board election and certification. The Trial Examiner and the Board thereupon upheld the election and found illegal Company refusal to bargain with the duly certified representative of its employees.

In the review proceedings in the court below the Union was granted intervention. In its brief to the court, the Union argued that the Company's deliberate choice to withhold its proof in the Board hearing on its election objection was an abandonment and waiver of those objections. The court below overruled that Union contention (see Pet., p. 31). In addition, it reversed the Labor Board's considered judgment that the election on April 23, 1965—wherein the Union won a majority of votes cast by about 90% of the employees—was a fair expression of the employees' uncoerced desire for United Shoe Workers representation.

The court below finds fault with the conduct of the elec-

tion by the Labor Board, although the Company when given an opportunity to litigate that issue before the Board declined to do so. The court also overrules the Board's judgment that a minor inaccuracy in one of the numerous campaign leaflets distributed by the Union did not prejudice the employees' votes in the ballot box. That the several facts stated in this campaign leaflet are substantially correct is not denied by the court below; but it finds fatal the single inaccuracy that under union contracts in New York free medical benefits obtain "for all Union members and dependents", whereas in fact they are free for members but "clinic diagnostic services" are partially contributory for dependents (Pet., p. 39, n. 15). Thus, contrary to the Labor Board's judgment, the court opines that some employees who voted for the Union would not have done so had they known that under certain union contracts in another state employees' dependents, while receiving free hospital and surgical benefits, pay 50 percent of clinic services.

ii. *Reasons for Granting the Writ.* It would be redundant for us to repeat the demonstration in the Labor Board's Petition for Certiorari that review is required in the present case, particularly in view of the emphatic dissenting opinion of Judge Bell (Pet., pp. 48-49). That posthumously published dissent chastises the majority for preferring judicial predilections to the expert judgment of the Board, which judgment Congress subjected to judicial reversal only in case of clear error.[2] Even through the opaque phraseology

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[2] See, generally, Jaffe, *Judicial Review*, 69 Harv. L. Rev. 1020, and cases cited in the Board's Petition for Certiorari, p. 12. And it should be noted that whether the *"substantial evidence"* or the *"reasonable basis in law"* test is applied, the Board's determination in the present case clearly must stand. For it is manifest that the Board not only had persuasive grounds for denying the Company's objections but it is the circuit court's ruling which is wholly arbitrary in imposing unprecedented perfection requirements upon the conduct of campaigns and elections.

of judicial decorum one discerns the depth of Judge Bell's concern about his colleagues' expansion of their review powers. "Once again," says the dissenting opinion, the majority judges "invade" the area of administrative expertise "to overthrow a result they do not like." It is, said Judge Bell, "quibbling to use the two points they have chosen to find the Board clearly in error . . ."

This Court has frequently found it necessary to review and reverse Courts of Appeals for invading the statutory authority and expertise of the Labor Board. See, e.g., *NLRB* v. *Mattison Machine Works*, 365 U.S. 123; *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324; *NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404. Once again this Court is called on to correct and caution a lower court inclined to substitute its views on labor relations policy for the considered and experienced judgment of the National Labor Relations Board. And corrective review is particularly called for here because this case touches on the sensitive free speech area Congress expressly preserved from regulatory intrusion in Section 8(c) of Taft-Hartley. Here the Board has respected that limitation, but a reviewing court has undertaken to censor election literature in a way which both the First Amendment and the statute forbid.

To make every union and employer the insurer of its campaign statements' absolute accuracy, as does the court below, would substitute the rigors of governmental censorship for the freedom of speech and persuasion which have characterized elections throughout our political history. Perhaps some argument could be made in favor of imposing on the participants' campaigns in Labor Board elections an absolute accuracy requirement. But until the Congress or the Labor Board approves so radical a departure from our constitutional tradition, immaterial inaccuracy in a

single campaign leaflet is no ground for a circuit court to cancel a union's hard-won victory in a Board-supervised representation election.

Respectfully submitted,

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